FILE COPY

Office Supreme Court, U.
FILED
SEP 14 1931
CHARLES ELMORE CROPL
CLERK

(35755)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

NO. 40.

STATE TAX COMMISSION OF MISSISSIPPI, et al, etc., Appellants,

VS.

INTERSTATE NATURAL GAS COMPANY, Inc., Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR APPELLANTS

GEO. T. MITCHELL, Attorney General,
J. A. LAUDERDALE, Assistant Attorney General,
Attorneys for Appellants

EDWIN R. HOLMES, Jr., Special Agent,
Of Counsel.

INDEX

		Page
I.	Preliminary Statement	1
II.	Questions Involved	3
III.	Analysis of Facts	4
IV.	Brief and Argument	10
	A. Argument on Reason and Principle	10
	Tax Computed by Mileage Method	11
	Tax Indirectly Affecting Interstate Commerce	11
	Appellee Engaging in both Interstate and Intrastate Business	13
	B. Discussion of Authorities	17
	Amount and Form of Tax in Question	18
	Effect on Interstate Commerce Indirect	22
	Appellee is Engaged in Intrastate Business in Mississippi	24
	Cases Relied on by Appellee	34
V.	Conclusion	36

STATUTE REFERRED TO.

Section 163, Chapter 88, Laws of 1930 ..... 2, 4, 12

TABLE OF CASES

Cases Relied on by Appellant

Allen v. Pullman Palace Car Co., 191 U. S. 171, 48 L. Ed. 143 18

Atlantic C. L. R. R. v. Standard Oil Co., 275 U. S. 254, ... 25, 27

Baltic Mining Co v. Massachusetts, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127, ... 21

California v. Central, etc., R. R. Co., 127 U. S. 1, 32 L. Ed. 150, ... 18

Carson Petroleum Co. v. Vial, 279 U. S. 95, ... 25, 26

Chaney Bros. v. Massachusetts, 246 U. S. 147, ... 22

Delaware Railroad Tax, 18 Wall. 231, 21 L. Ed. 896, ... 18

East Ohio Gas Co. v. Tax Commission of Ohio, U. S.

Sup. Ct. Advance Opinions No. 15, page 700 ..... 26, 32, 34
General Oil Co. v. Crane, 209 U. S. 211 ..... 25, 26
Hump Hair Pin Mfg. Co. v. Emmerson, 258 U. S. 290, 66 L. Ed. 622, ... 23
Knoxville R. R. Co. v. Harris, 99 Tenn. 708, 53 L. R. S. 921 18
Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 35 L. Ed. 994 24
New Jersey Bell Tel. Co. v. State Board of Taxes and Assessments, 280 U. S. 332, 74 L Ed. 463, 50 Sup. Ct. 111 18
New Orleans, etc., R. R. Co. v. State, 110 Miss. 290 19
New York v. Sohmer, 235 U. S. 549 22
Ozark Pipe Line Co. v. Monier, 266 U. S. 555 ..... 25, 30
Pullman, etc. Co. v. Richardson, 261 U. S. 380, 67 L. Ed. 682, 43 Sup. Ct. 366 ..... 17, 22
Pullman Palace Car Co. v. Adams, 189 U. S. 420, 47 L. Ed. 871 23
Sonneborn Bros. v. W. A. Keeling, 266 U. S. 505, 67 L. Ed. 1095 ..... 25, 29
Sprout v. South Bend, 277 U. S. 163 24
St. Louis R. R. Co. v. Arkansas, 235 U. S. 350 22
Superior Oil Co. v. State of Mississippi, 280 U. S. 390 25
U. S. Express Co. v. Minnesota, 223 U. S. 335, 56 L. Ed. 459 24

Cases Relied on by Appellee

Eureka Gas Co. v. Hallahan, 257 U. S. 265 36
Missouri v. Kansas Gas Co., 265 U. S. 298 ..... 34, 35
Peoples Gas Co. v. Pennsylvania, 270 U. S. 550 34
Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, 64 L. Ed. 434, 40 Sup. Ct. 279 34
Pennsylvania v. West Virginia, 262 U. S. 533 35
Public Utilities Commission v. Landon, 245 U. S. 236 35
United Fuel Gas Co. v. Hallahan, 257 U. S. 277 36

(35755)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

NO. 40.

STATE TAX COMMISSION OF MISSISSIPPI, et al, etc., Appellants,

VS.

INTERSTATE NATURAL GAS COMPANY, Inc., Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR APPELLANTS.

I.

PRELIMINARY STATEMENT

The Interstate Natural Gas Company filed its Bill of Complaint in equity in the United States District Court for the Southern District of Mississippi asking injunctive

relief against the State Tax Commission and the Attorney General of the State of Mississippi and all successors, employees, or agents of said officials to restrict them from collecting a privilege tax imposed upon appellee by virtue of Section 163 of the Privilege Tax Laws of Mississippi of 1930. This suit involved the constitutionality of a state statute, and hence came within the provisions of Section 380, United States Code, Annotated and was tried before a court composed of District Judges Edwin R. Holmes and Wayne G. Borah and Circuit Judge Rufus E. Foster. A hearing was had before this court on bill, answer and agreed statement of facts on September 29, 1930, at which time the court granted to appellee a preliminary injunction.

Subsequently on February 20, 1931, a final hearing was had in this cause before a court composed of the above named judges. After the hearing upon bill, answer, agreed statement of fact and arguments of counsel, the court entered a decree making permanent and perpetual the preliminary injunction granted on September 27, 1930, and permanently and perpetually enjoining appellants from collecting, or attempting to collect, from appellee the privilege tax imposed by virtue of Section 163 above mentioned.

Said decree of February 20, 1931 was based upon the conclusion of the court that the appellee, Interstate Natural Gas Company, Inc., was and is engaged wholly and exclusively in interstate commerce in the State of Mississippi, and that, therefore, Chapter 88 of the Laws of 1930 of the State of Mississippi attempting to levy a privilege tax on the pipe line of appellee in Mississippi was in violation of

Article 1, Section 8, Clause 3 of the Constitution of the United States, and, therefore, invalid and void as affecting apellee, because said privilege tax law in this case unduly burdens interstate commerce and constitutes an unreasonable interference therewith.

From this final decree the appellants perfected an appeal to this court under Section 266 of the United States Judicial Code and Section 380, Title 28, United States Code, Annotated.

II.

QUESTIONS INVOLVED.

It will be observed from the preliminary statement of this case that the lower court in its final decree decided:

(1) That the appellee was engaged wholly and exclusively in interstate commerce in the State of Mississippi, and,

(2) That Section 163, Chapter 88, of the Privilege Tax Laws of Mississippi of 1930 was unconstitutional and void *as affecting appellee.*

It, therefore, follows that the sole question involved on this appeal is whether or not appellee is engaged wholly and exclusively in interstate commerce in Mississippi, or is engaged in both intrastate commerce in Mississippi and interstate commerce, and this question can only be resolved by applying the law to the facts as set out in the agreed statement of facts upon which this case was tried.

III.

ANALYSIS OF FACTS

The agreed statement of facts (Rec. p. 55) show that the appellee is a Delaware corporation and is the owner of a large acreage of proven mineral lands in the area known as the Monroe Gas Fields in the State of Louisiana, and that appellee has constructed, owns and operates a pipe line or lines extending from said field in a southeasterly direction through the State of Mississippi and again into the State of Louisiana. In the State of Mississippi complainant has 72.42 miles of pipe having a diameter of 22 inches; 8.11 miles having a diameter of 12 inches; and 4.99 miles of pipe having a diameter of 10 inches, all located in Wilkinson and Adams Counties, Mississippi, of the total value in Mississippi in excess of $2,000,000.00.

This line of pipe in Mississippi is a link in the line of pipe of complainant extending from Louisiana through Mississippi and again into Louisiana. Under the terms and provisions of Section 163, Chapter 88, of the Privilege Tax Law of Mississippi, 1930, the appellee is liable to the state of Mississippi for a privilege tax for the year 1930 in the sum of $3,873.65. (Tr. of Record pp. 17-57).

The facts further show that appellee sells its natural gas so transported to several distributors in the State of Louisiana, to a distributor at Natchez in the State of Mississippi, namely, the Mississippi Power and Light Company, and to a distributor at Woodville in the State of Mississippi, namely, the Town of Woodville. (Tr. of Record pp. 56-57).

The agreed statement of facts further shows that the privilege tax law of 1930 of the State of Mississippi and the contract between appellee and the Town of Woodville and appellee and the Central Power and Light Company are to be considered as part of the facts of this case. The said contract between appellee and the Central Power and Light Company of Natchez, Mississippi was assigned and is now owned by the Mississippi Power and Light Company. (Tr. of Record p. 55).

Section 163 of the privilege tax laws of Mississippi, 1930, reads in part as follows:

> "Section 163. Pipe Line Company.—Upon each person engaged and/or continuing in this state in the business of operating a pipe line or transporting in or through this state oil or natural or artificial gas through pipes and/or conduits a tax as follows:
>
> On each mile of pipe having a diameter of 20 inches or more.....$50.00
> On each mile of pipe having a diameter 15 inches or less than 20 inches.....$35.00
> etc."

Section 244 of said laws is as follows:

> "Section 244. That if for any reason any section, paragraph, provision, clause, or part of this chapter shall be held unconstitutional or invalid that fact shall not affect or destroy any other section, paragraph, clause, or part of this chapter not in and of itself invalid, but the remaining portion hereof shall be in force without regard to that so invalidated." (Tr. of Rec. 26.)

The two contracts above mentioned between the appellee and the Town of Woodville and the appellee and the Central Power and Light Company are the same in their principal features except as to wording, name of parties and arrangement thereof. I will, therefore, analyze them together. (Tr. of Rec. p. 51.)

The facts show that these two contracts were executed in New York City, New York, and that payments for natural gas purchased by the two distributors at Woodville and Natchez respectively are made at the office of the appellee company in Monroe, Louisiana. The appellee calls these two contracts "prior orders" for the purchase and delivery of natural gas. In other words, the appellee's contention is that the distributors at Natchez and Woodville by virtue of these two contracts order gas from appellee's gas field at Monroe, Louisiana before it is sent from the State of Louisiana.

An analysis of the contracts shows the following:

First, the contracts used the words "to sell" and "to purchase." The contracts, therefore, are executory contracts of sale. (Tr. of Rec. p. 40).

Second, the contracts show that the distributor must construct and install a pipe line from the city of Monroe to a tap outside the city limits in appellee's 22 inch pipe line located in Mississippi. The facts show that both distributors have constructed such pipe lines from the Towns of Woodville and Natchez respectively in order to tap appellee's 22 inch pipe line, and that both the distributors and

appellee have constructed and installed all taps, regulators, meters, etc., as required in said contracts. (Tr. of Rec. pp. 40-41).

Third, according to the contract the appellee agreed to deliver gas to the distributors at or about a pressure of 50 pounds per square inch and agreed to install and maintain at the point of delivery the necessary regulators to accomplish delivery at or about said pressure. (Tr. of Rec. p. 41).

Fourth, the appellee agreed to install a recording thermometer at said point of delivery to test the flowing temperature of the gas. (Tr. of Rec. p. 41).

Fifth, appellee agreed to erect and maintain at its own expense at the delivery point hereinbefore mentioned a measuring station properly equipped with a Westcott orifice meter, which meter was deemed by the terms of the contract the exclusive method of measuring all gas delivered and sold under this contract. On the request of the distributor, it became appellee's duty to test all meters in service at said measuring station at its own expense. It will be noted that the taps, regulators, recording thermometers, and meters were all by the terms of the contract to be installed, owned and operated by appellee at the points of delivery of natural gas to said distributors, which points of delivery as designated in the contract are in the State of Mississippi. (Tr. of Rec. p. 42.)

Sixth, the contract further shows that the prices to be paid by the distributor to the appellee for the gas pur-

chased are determined by the type of consumer to whom the gas is sold, the prices being fixed as follows: 35c per M for gas sold to domestic and commercial consumers; 20c per M for gas sold to industrial consumers. The contract then defines domestic, commercial and industrial consumers. It will be seen, therefore, that the price to be paid for the gas purchased is not and cannot be ascertained until actually delivered to the distributor in the State of Mississippi and consumed by one of the distributor's customers. (Tr. of Rec. p. 44).

Seventh, the contract shows that appellee has the right at all reasonable times to go upon the property of the distributor and to make such inspection and investigation of same as it desires, including the right to inspect distributor's books, accounts, meters and records for the purpose of informing itself as to the sales of gas and the condition of vendee's plant and system, etc. (Tr. of Rec. p. 46).

Eighth, the contract further shows that the obligations of the appellee under it are at all times subject to any obligations and prior contracts having legal preference, and that nothing in the contract in any way abridges the right of the appellee at any time to sell, transport and deliver gas to others, or to restrict or reserve its properties, or any part of them, for the exclusive benefit of said contract. (Tr. of Rec. p. 47).

The agreed statement of facts shows that these contracts between the appellee herein and the town of Woodville and the Mississippi Power and Light Company, respectively, are now in full force and effect. Both the ven-

dor and the vendee in each instance has complied and is complying with the terms of the contract. It can, therefore, be readily seen that the appellee in this case is doing the following things in the State of Mississippi, viz: The appellee is transporting from its gas fields in Monroe, Louisiana through its huge interstate trunk lines natural gas. At two points in Mississippi where appellee's interstate line is tapped, the appellee owns a regulator, a recording thermometer and a measuring station equipped with orifice meter. At both points the taps, regulators, thermometers and meters are owned and operated by appellee, and at those points appellee, by means of these instruments, reduces the pressure of the gas to approximately fifty pounds per square inch, records its temperature, measures the amount of gas which has passed through the tap, and then delivers the gas to the distributors at Woodville and Natchez, respectively. It would seem that appellee's control over the gas ceases there. However, as shown by the contract, its interest in the gas does not cease there, as the contracts provide that the price to be paid for the gas by the distributor is determined by the type of consumer to whom the gas is sold by such distributor. Furthermore, the appellee may inspect distributor's books, accounts, meters, lines and records at any reasonable time. It will be further seen that appellee cannot determine what gas or how much gas it will treat, prepare, sell and deliver to the respective distributors until such gas has actually reached appellee's taps located in the State of Mississippi. (Tr. of Rec. p. 58).

IV.

BRIEF AND ARGUMENT

A.

ARGUMENT ON REASON AND PRINCIPLE

As said at the outset, the final decision of the instant case hinges upon the question whether the appellee, the Interstate Natural Gas Company, is engaged in an intrastate business in the State of Mississippi. There is no doubt but that appellee is engaged in interstate commerce and is carrying on an interstate business when it transports natural gas through trunk lines from its Monroe gas fields through the State of Mississippi for ultimate sale and delivery to distributors at Baton Rouge and New Orleans, Louisiana. The question, therefore, is whether the appellee in addition to carrying on its interstate business, is engaged in an intrastate business conducted in the State of Mississippi by virtue of its sales of gas to distributors at Natchez and Woodville, respectively.

Before a discussion of this question, however, it is necessary to dispose of the two questions:

1. Is a state privilege or occupation tax valid when computed by the mileage method, such tax being a tax solely for the privilege of carrying on an intrastate business?

2. Can a state levy a privilege or occupation tax upon the intrastate business of a person, firm or corporation when such person, firm or corporation is also engaged in

the carrying on of an interstate business which is incidentally and indirectly affected by the tax?

TAX COMPUTED BY MILEAGE METHOD.

The Privilege Tax Law of Mississippi of 1930 shows from a reading of the whole act that it was an effort on the part of the Legislature to levy a tax on the various kinds of trades, occupations and businesses named therein for the privilege of carrying on such trades, occupations and businesses within the confines of the State of Mississippi. It will be seen that in a great majority of instances the tax fixed by the Legislature was a certain arbitrary sum, which a person who intended to engage in such business must pay for the privilege of so conducting or engaging in that business in Mississippi. No one now questions the right of the Legislature to levy a fixed and certain sum by way of a privilege tax. It, therefore, follows that if the Legislature has such power it has the power to levy a privilege tax which is capable of becoming fixed and certain by means of a simple mathematical computation. Such is the tax in question:

TAX INDIRECTLY AFFECTING INTERSTATE COMMERCE.

The question whether a state can levy a tax upon an intrastate business when such a tax indirectly and incidentally affects an interstate business may be determined, and should be determined, by the question whether such interstate business could be continued without the burden of such tax, provided the intrastate business was discontinued.

In the instant case there seems to be no doubt that if the appellee discontinued its sales of gas to the Mississippi distributors the tax levied by virtue of Section 163 of the Mississippi Privilege Tax Law of 1930 could not be collected. In others words, if appellees simply carried on its business of transporting gas from its Monroe gas fields through the State of Mississippi for ultima sale and delivery to distributors at Baton Rouge and New Orleans, Louisiana, there would be and could be no privilege tax levied by the State of Mississippi on such transportation. The tax levied by said Section 163 is a tax on the business of operating a pipe line in this State. By virtue of Section 244 of said Act, all other clauses or parts of Section 163 which might be held unconstitutional or invalid may be disregarded, and this Court may turn its attention to the remaining portion of Section 163, which by virtue of Section 244 "shall be in force without regard to that so invalidated."

As stated before, the intention and purpose of the Legislature as gleaned from the act as a whole is shown to be to tax the privilege of carrying on the trades, occupations and businesses named therein in the State of Mississippi. So Section 163 of said act levies a tax only upon the privilege of engaging in the business of operating a pipe line in the State of Mississippi. It is clear that the business of operating a pipe line in Mississippi means the business of transporting, treating, preparing, selling and delivering natural or artificial gas in the State of Mississippi just as the business of operating a railroad, taxed by Section 159 of said act, means the transporting, handling and

delivering of passengers and freight in the State of Mississippi. The same may be said of Section 160, providing a tax on telegraph companies operating a telegraph business in this State, and Section 161, taxing the business of operating a sleeping car or palace car. Therefore, if appellee in the instant case would discontinue its activities in Mississippi, namely, the treating, transporting and selling of natural gas at wholesale to distributors at Natchez and Woodville it could continue the transporting of natural gas through Mississippi in its interstate mains without the imposition thereon of the indirect burden of Mississippi's occupation tax.

APPELLEE ENGAGING IN BOTH INTERSTATE AND INTRASTATE BUSINESS.

From the facts as agreed upon in this case, it is clear that the appellee is engaing in interstate commerce. There can be no doubt that so far as the State of Mississippi is concerned no regulation or burden can be placed upon appellee's business of transporting natural gas through the State of Mississippi in its interstate mains. The question for decision, and about which there is a conflict, is whether or not the fact that appellee taps its interstate mains at two points in Mississippi, reduces by means of a regulator the pressure of the gas passing through such taps, measures by means of a thermometer and meter the temperature and quantity of the gas allowed to pass through the taps and regulator, and then sells and delivers such gas so treated and prepared to distributors at Woodville and Natchez in the State of Mississippi, constitutes a business of purely local concern exclusively within the jurisdiction of the

State. There is no doubt that the gas moving through appellee's interstate trunk lines is in interstate commerce, but when appellee taps its own line, treats, prepares and sells the gas at wholesale it apears that the treatment and division of the large compressed volume of gas is like the breaking of an original package after shipment in interstate commerce.

Appellee's contention that its business is purely interstate business is based solely upon the theory that the two contracts above mentioned constitute orders sent by the distributors at Woodville and Natchez to the appellee's Monroe gas fields. In other words, appellee contends that these two contracts change the nature of what would ordinarily be intrastate business to interstate business. There seems to be no doubt that in the absence of these contracts the appellee would be engaged in treating, preparing for sale and selling natural gas in the State of Mississippi without having previously received an order in the State of Louisiana for such gas. It is a reasonable principle that the contract between the parties cannot change the legal effect or nature of the transaction between them. An examination of the contracts which appellee here contends are orders for interstate shipment of natural gas shows the following:

First: The vendee does not agree to purchase any particular amount of gas from the vendor, or to purchase any gas at all at any particular time.

Second: The vendor is not obligated by virtue of the contract to sell the vendee gas in preference to others, or

to restrict or reserve any of its properties for the vendee's exclusive benefit.

Third: There is no definite selling price for the gas in the contract. The price for which the gas is sold can only be determined after it has been actually used by the consumers (purchasing it from vendee) in Woodville and Natchez, Mississippi.

Fourth: The vendee's rights under the contract are subject to any prior obligations and contracts of vendor.

Fifth: The determination of the amount of gas purchased from vendor by the respective vendees must be determined by the vendor's meter in the State of Mississippi, and if vendee also measures such gas, the method of adjusting any differences must be determined by testing vendor's and vendee's meters in Mississippi.

It may be seen from this analysis of these contracts that they are simply executory contracts of sale. The appellee cannot tell what gas it will sell to the distributor at Woodville, or what gas it will carry on through the State of Mississippi into Louisiana. None of the gas is actually sold before it leaves the Monroe gas fields in Louisiana. It is true that the appellee is transporting gas with a view to selling it, but before the appellee relinquishes the title and control of any of its gas by delivery to the distributor, either at Natchez or Woodville, it must, under the very terms of its executory contract of sale, prepare and treat such gas for sale and delivery to such distributor. The

appellee alone controls and operates its taps, regulators, thermometers and meters.

Most of the Sections of Mississippi's 1930 Privilege Tax Laws levy a tax on the privilege of selling some commodity. For example, Section 42 levies a tax on dealers selling tobacco or cigarettes in wholesale lots. This is a tax on the privilege of selling cigarettes in wholesale quantities in the State of Mississippi. It is undoubtedly true that if an individual in Mississippi ordered a certain quantity of cigarettes from a Louisiana Company, there would be no tax on the transaction as it would be a purely interstate commerce transaction. However, let us presume that the said Louisiana Company shipped carload lots of cigarettes by rail through the State of Mississippi to a point in Alabama, and let us suppose that a distributor in Jackson, Mississippi, agreed to purchase cigarettes from this Louisiana Company in any quantity that he desired and at any time he desired, it being agreed that in order to obtain delivery of these cigarettes he would simply notify the Company upon the arrival of its carload of cigarettes in the City of Jackson that he desired cigarettes from that car. The Company would then have an agent deliver to the purchaser the number of cartons of cigarettes desired at such time. It seems clear that such a transaction would constitute the selling of cigarettes by a Louisiana Company in the State of Mississippi, and the tax on cigarettes would, therefore, apply.

The instant case is even stronger than the example cited for the reason that the appellee herein does not simply sell and deliver the gas to the Mississippi distributors after

it has arrived in Mississippi. The appellee, in addition to and prior to delivering it must treat and prepare such gas for sale and delivery and, therefore, in effect breaks the original package which has been transported in interstate commerce and prepares, sells and delivers the commodity in Mississippi. Hence it seems, that the appellee is carrying on both an interstate busines and an intrastate business in Mississippi, and that for the privilege of carrying on such intrastate business in Mississippi it may be taxed under Section 163 of the Privilege Tax Law of Mississippi of 1930, whether such tax incidentally and indirectly affects appellee's interstate business.

The determining factor in both the example above stated and the instant case is that the sale of the commodity in question is actually consummated at a time when such commodity is in the State of Mississippi. The instant case is not merely a case involving the delivery of an interstate shipment sent in response to an order. It is a case where the original package, being transported in interstate commerce, is broken, the commodity treated and prepared for sale and actually sold and delivered in the State of Mississippi.

B.

DISCUSSION OF AUTHORITIES.

It is elementary that a state can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom.

Pullman Etc. Co. vs. Richardson, 261 U. S. 380, 67 L. Ed. 682, 43 S. Ct. 366:

N. J. Bell Telephone Company vs. State Board of Taxes and Assessments, 280 U. S. 332, 74 L. Ed. 463, 50 S. Ct. 111.

It is likewise elementary that a state may require payment of an occupation tax by one engaged in intrastate commerce or business, provided only that the taxing method chosen by the legislature is constitutional and is not simply a means of regulating or burdening interstate commerce directly.

AMOUNT AND FORM OF TAX IN QUESTION.

The motives of legislature and the policy or impolicy of the statutes to be construed are things with which the courts have nothing to do. If the State of Mississippi is possessed of the power to impose the privilege tax in question the amount of the tax and the form of the tax are questions for the legislature alone to decide. The only concern of this court is with the validity of this tax.

Allen vs. Pullman Palace Car Company, 191 U. S. 171, 48 L. Ed. 143;

Knoxville R. R. Company vs. Harris, 99 Tenn. 708, 53 L. R. S. 921;

Delaware Railroad Tax 18 Wall. 231, 21 L. Ed. 896;

California vs. Central, Etc. R. R. Company, 127 U. S. 1, 32 L. Ed. 150.

It is the rule of the Federal Courts to follow the state court's construction of its state statute. While it is true

that there is no decision of the Supreme Court of Mississippi construing this statute, there is a decision by such court construing a similar statute. In the case of *N. O. Etc. R. R Company vs. State*, 110 Miss., 290, the Supreme Court of Mississippi passed on the question whether a privilege tax on railroads for operating a railroad business within the State of Mississippi was constitutional. The statute there construed was similar to Section 159 of this act which provides a tax upon each person continuing in the business of operating a railroad in this state. The court held in that case that it was the purpose of the statute to impose on railroads a privilege tax for doing business within the State of Mississippi, and the court also held that the method of ascertaining the amount due, namely, by measuring the amount of tax by the number of miles of railroad track, was reasonable and valid. In that case the court said:

> "Taking the act by the four corners and keeping in view the object to be attained, we find this statute a part of the general scheme for levying privilege taxes on the several and various kinds of business, trades, and professions, done, practiced and carried on in Mississippi. The state in its sovereign capacity is exacting from those who do business and practice and enjoy their several trades and professions a tax as a condition precedent to the right of exercising privileges. The subject of the tax in each case is the party or corporation doing business, plying his trade, or practicing his profession in Mississippi, and not, of course, in a foreign state or county. The business sought to be taxed is, in each instance, the business done within the confines of our own state. In the case

of appellant the tax sought to be imposed was certainly intended to be upon the business enjoyed by it in Mississippi and as a domestic corporation. Every intelligent man knows, and the legislature in enacting this law well knew, that a tax could not be imposed by our legislative department on interstate commerce, and that no law could be passed burdening interstate commerce or seriously embarrassing railroads in doing such business, or in doing business for the United States government. It is therefore unreasonable to assume that the legislature had any intention of burdening or embarrassing interstate commerce. The act, as stated, appears in the chapter dealing with privilege taxes, and not in connection with any statutory provisions providing the terms and conditions upon which foreign corporations may do business in our commonwealth. There is no effort here to impose hard conditions or charge fees for admitting foreign corporations or allowing railroads to do an interstate business. The subject-matter dealt with is entirely different. There is here not the slightest suggestion that the statute is attempting to discriminate against, or to impose any unreasonable regulations upon foreign corporations or upon railroads traversing our territory. This is not a tax upon any agent or agency of any interstate railroad, or upon any means employed by such railroad company to get business, as was the fact in many of the cases decided by the United States Supreme Court and relied on by appellant. We are not called upon to take issue with any of the pronouncements of the United States Supreme Court in any of the cases cited by counsel for appellant. This is not a tax on the income or gross earnings of

any railroad. There is no effort here to tax the earnings of appellant or any other railroad company. The tax for the privilege of doing business in Mississippi is upon the mileage of railroads in Mississippi, and not only is this true, but the legislature, in an apparent effort to be reasonable, has fixed the maximum rate per mile, and consequently a maximum amount beyond which the tax in no case could run. In this regard it falls within the principle announced by the supreme court of the United States in *Baltic Mining Company vs. Massachusetts*, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127, as follows:

> "'So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable'."

"The Baltic Mining Company Case is differentiated from the case at bar, but the principle announced is applicable to the instant case. A railroad company might own a transcontinental railroad running through Mississippi and earning annually millions of dollars, yet this fact could, in no way, under any view of the case, influence the Commission in fixing upon such road a tax in excess of forty-five dollars per mile, prescribed to be paid by railroads of the first class."

It, therefore, follows that the method of measuring the tax in the instant case by the number of miles of pipe line is a reasonable method of computing the tax. Hence, it appears that the tax levied is a constitutional valid tax the sum of which can be readily computed.

EFFECT ON INTERSTATE COMMERCE INDIRECT.

The next question which arises is whether the tax is one purely for the privilege of carrying on an intrastate busines and if so whether it can be validly imposed, even though it incidentally and indirectly affects or burdens appellee's interstate business.

This court has held in the Pullman Palace Car Company Case, supra, the case of *St. Louis R. R. Company vs. Arkansas*, 235 U. S. 350, and the case of *New York v. Sohmer*, 235 U. S. 549, that a state license or occupation tax on a foreign corporation for the privilege of doing business in such state is valid and constitutional, although such corporation may also be engaged in doing an interstate business. And in the case of *Chaney Brothers vs. Massachusetts*, 246 U. S. 147, the court held that a privilege tax on stores keeping goods in the state partly for intrastate and partly for interstate sale was valid as being a tax solely on the privilege of doing business in the state. It will be noted that in this case the goods were in the state at the time of the sale.

The test of the constitutionalty of a privilege tax upon intrastate business which tax indirectly burdens in-

terstate busines is whether or not the payment of the tax is compulsory before either an intrastate or interstate business can be carried on within such state. This principle was announced in the case of *Pullman Palace Car Company vs. Adams*, 189 U. S. 420, 47 L. Ed. 871, wherein the court held that the privilege tax on the State of Mississippi upon each car carrying passengers within the state was a valid tax. The conclusion in this case, as in the Pullman Palace Car Company case arising in Tennessee, was based upon the right of the company to abandon the intrastate business if it saw fit. The court said that the pullman company might continue its interstate business in Mississippi declining local business and thereby escape the tax levied upon business wholly within the state. This is equally true in the business of transporting and selling natural gas.

In the case of *Hump Hair Pin Manufacturing Company vs. Emmerson*, 258 U. S. 290, 66 L. Ed. 622, the court enunciated this principle as follows:

> "While a state may not use its taxing power to regulate or burden interstate commerce (citing cases), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights. * * * The turning point of these decisions is whether, in its incidents the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon, it, or whether it affects it only incidentally or remotely, so that the tax is not in

reality a burden, although in form it may touch, and in fact, distantly affect it."

See also:

U. S. Express Company vs. Minnesota, 223 U. S. 335, 56 L. Ed. 459;

Maine vs. Grand Trunk Railway Company, 142 U. S. 217, 35 L. Ed. 994.

The clearest statement on this point seems to be found in the case of *Sprout vs. South Bend*, 277 U. S. 163.

Mr. Justice Brandeis, in delivering the opinion of the court said:

> "A state may by appropriate legislation require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But, in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intra-state business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

APPELLEE IS ENGAGED IN INTRASTATE BUSINESS IN MISSISSIPPI.

The decision of this case is now narrowed to a decision of the question whether the appellee herein, Interstate Natural Gas Company, is carrying on a purely interstate business in Mississippi, or whether it is carrying on in addition

to its interstate business an intrastate business in Mississippi.

The appellee's chief contention is that the very terms of its contracts with the distributors at Woodville and Natchez respectively show that it is not carrying on an intrastate business. In the recent case of *Superior Oil Company vs. State of Mississippi, ex rel, Knox, Attorney General,* 280 U. S. 390, the court held that it was not within the power of the parties by the form of their contract to convert a local business into an interstate business protected by the commerce clause when the contract achieved nothing else. In other words, it is not the form of the contract which determines whether the appellee here is engaged in intrastate business in Mississippi but rather it is the law of the land as evolved from the decisions of this court which determines when applied to the facts of the instant case the nature of the business carried on by appellee. The cases laying down the principle here involved and which are controlling in the instant case are as follows:

General Oil Company vs. Crane, 209 U. S. 211;

Sonneborn Brothers vs. W. A. Keeling, Attorney General of Texas, 266 U. S. 505, 67 L. Ed. 1095;

Ozark Pipe Line Company vs. Monier, 266 U. S. 555;

Atl. C. L. R. R. vs. Standard Oil Company, 275 U. S. 254;

Carson Petroleum Company, vs. Vial, Sheriff and Tax Collector, 279 U. S. 95;

East Ohio Gas Company vs. Tax Commission of Ohio, cited in United States Supreme Court Advance Opinions, No. 15 at page 700, and decided by this court without a dissenting opinion on May 18, 1931.

It will be noted that all of the cases cited above as being controlling in the instant case are cases involving the question of taxation of an intrastate business.

In the case of *General Oil Company vs. Crane*, supra, the appellant conducted a large oil business in Memphis, where it gathered from the North much oil and maintained an establishment for its disposition. It had tanks of various sizes from which the oil was put in barrels or other vessels to be sold either locally or in other states. Part of this oil was placed in a stationary tank known as Tank No. 1 and marked "Oil Already Sold in Arkansas, Louisiana, Mississippi." The oil yet to be sold was kept in other tanks. Appellant contended that the oil in Tank No. 1 was on a continuous trip through Memphis to the ascertained customers in Arkansas, Louisiana and Mississippi and was not taxable at Memphis as it was always in interstate commerce. The court held that the activities of the company in thus separating the oil after it reached Memphis into various amounts and in different containers was itself a local business in Memphis, and that the delivery and receipt of the oil in Memphis and its subsequent shipment made two separate interstate shipments and permitted local taxation on the oil while it awaited the second shipment.

On the other hand, in the case of *Carson Petroleum Company vs. Vial, supra*, oil was stored at a port in Lou-

isiana in storage tanks awaiting shipment by boat. None of it was sold, segregated or treated, or otherwise disposed of in the port. The principle object was to complete the shipment as swiftly as possible. In that case the court held that the continuity of the journey was not broken by the storage, and that a tax on the oil while so stored was unconstitutional as the entire transaction was one in interstate commerce.

It may be readily seen by a comparison of the two cases just analyzed that the determining factor in those cases was whether the oil was separated, treated, prepared and sold while within the confines of the particular state seeking to levy a tax thereon.

It is true that in the instant case there are no storage tanks. The gas is continually flowing from the Monroe gas fields in Louisiana into and through the State of Mississippi, but this also was the fact in the case of *Atl. C. L. R. R. Co. vs. Standard Oil Company, supra.* The plaintiff there was engaged in selling oil within the State of Florida. It had storage tanks on or near the Florida seaboard in which it kept supplies sufficient to meet the demands of its business for considerable periods in advance and which it replenished from time to time by fresh supplies purchased by it from other companies. The supplies so purchased were shipped in by the vendors from Louisiana and Mexico respectively and delivered in bulk to plaintiff by pumping the oil from the ships through plaintiff's pipe lines into plaintiff's storage tanks. None of the oil so brought in was designated or intended for any particular point in Florida.

The court, holding that the nature of the commerce in controversy in that case was intrastate, said:

> "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by the mere billing or forms of contracts, although that may be one of a group of circumstances tending to show such character. The re-shipment of an interstate or foreign shipment does not necessarily establish a continuity of movement nor prevent the shipment to a point within the same state from having an independent or intrastate character even though it be in the same cars. * * * * We have no hesitation in finding that the nature of the commerce in controversy in this case was intrastate. * * * * The argument is made that these are continuous streams of oil from Baton Rouge or Tampico into the bulk stations in the interior of Florida where it is sold to the customers of the plaintiff and that its interstate character continues through that entire passage. It may as suggested in the argument that oil is being discharged into plaintiff's receptacles for its storage at the same time that it is being discharged from the storage tanks into storage tank cars for its distribution, but that is not at all inconsistent with its being a closing of interstate or foreign transportation and beginning of intrastate distribution for the purpose and business of the plainiff."

The similarity between the Atlantic C. L. R. R. Co. Case, supra, and the instant case is that in both cases the commodity transported in interstate commerce is not pre-

vented from having an independent or intrastate character simply because of such fact.

Another of appellee's contentions is that the mere fact that the gas is actually sold, that the title to it actually passes at a time when the gas is in the State of Mississippi is not important. Appellee, however, does not consider the fact that in addition to selling and delivering such gas, it treats it and prepares it for sale in Mississippi. It appears that the case of *Sonneborn Brothers v. W. C. Keeling, etc.*, supra, is authority to the contrary. In that case Sonneborn Brothers had an office in Dallas, Texas, and sold oil. The State of Texas sought to tax them as wholesale dealers in oil, the tax to be computed on the gross amount collected and uncollected from all sales made within the State and in a sum equal to two per cent of such gross amount. The tax in question was an occupation tax. The firm's sales consisted of four broad classes: one, the sale of oil which, when sold, was not in Texas; two, sales of oil to be transported from Texas and delivered in another state; three, sales of oil shipped into Texas and afterwards sold from the store rooms of appellants in the unbroken original packages; four, sales in Texas from broken packages. It was admitted that the receipts from the first two classes could not be taxed and the receipts from class four could be taxed. The question for decision was whether the sales in unbroken original packages, just as received in interstate commerce, could be taxed. In considering the question, the court said:

> "The interstate transportation was at an end and whether in the original packages or not, a

> state tax upon the oil as property or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject."

Pointing out that the tax levied did not prevent the appellant from carrying on its interstate business the court continued:

> "It is enough to point out the radical difference between state legislation preventing any sale at all accompanied by a forfeiture of the merchandise and the provision of an occupation tax applicable to all sales of such merchandise whether domestic or brought from another state. The one plainly interferes with, or destroys the commerce. The other merely puts the mechandise on an equality with all other merchandise in the state and constitutes no real hindrance to introducing the merchandise into the state for sale upon the basis of equal competition."

In this connection the appellee referred to and relied on the case of *Ozark Pipe Line Company v. Monier,* supra. In that case the State of Missouri sought to levy a franchise tax of one-tenth of one percent of the par value of capital stock of corporations. The facts showed that the Pipe Line Company operated a pipe line extending from Oklahoma through Missouri to a point in Illinois. The court held that Missouri's franchise tax could not be levied upon this company and was unconstitutional as to this company as the company was carrying on a purely interstate business and the tax was a tax imposed for the privilege

of doing business in corporate form and all businesses, both interstate and intrastate, would have to cease if it were not paid.

In discussing the question whether the pipe line company was engaged in a purely interstate business, the court pointed out that the company kept its principal office in Missouri, where it kept books and bank accounts, paid employees, employed labor, maintained telephone lines, entered into contracts and carried on various other activities in connection with and in furtherance of its pipe line operations. The court said, however, that all of this business conducted in the state of Missouri was exclusively in furtherance of its interstate business. These activities, the court said, "were the means and instrumentalities by which that business was done and in no proper sense constituted or contributed to the doing of a local business." The court further observed:

> *"Oil is neither received nor delivered in the State of Missouri."* (Italics ours.)

It is our contention, therefore, that, instead of being an authority in support of appellee's contention, this case, as shown by the reasoning in the opinion thereof, supports our contention.

The facts in the instant case, unlike the facts in the Ozark Pipe Line case, show that gas is not only delivered in the State of Mississippi, but is in addition thereto treated, prepared and sold in the State of Mississippi by the appellee herein. All of the activities of the Ozark Pipe Line Company in the State of Missouri were exclusively in

furtherance of its interstate business, but the activities of the Interstate Natural Gas Company, appellee here, in the State of Mississippi are entirely separate and disconnected from its interstate operations. It may be seen therefore that all of appellee's contentions are fully met and squarely determined by decisions of this court provided the activities of appellee in the State of Mississippi constitute the carrying on of an intrastate business.

This question was resolved in favor of appellant on May 18th, 1931, when this court, speaking through Mr. Justice Butler, delivered its opinion in the case of *East Ohio Gas Company v. Tax Commission of Ohio*, supra. In that case the appellant engaged as a public utility in the business of furnishing natural gas to consumers in more than fifty municipalities in the state of Ohio. It obtained its supply of gas partly from its own Ohio wells, partly from West Virginia wells and partly from Pennsylvania wells. It transported the gas obtained from West Virginia and Pennsylvania from the state line of those states in its high pressure transmission lines. Those high pressure lines were connected with distribution lines which led to the distribution systems in the various municipalities served. The company by means of regulators reduced the pressure of its gas when it was diverted into the various distribution lines from two hundred to three hundred pounds per square inch to from thirty to fifty pounds per square inch. The flow of gas was then controlled in the various municipalities and on the premises of consumers by the needs of the various consumers.

In deciding the question whether the Ohio tax for the

privilege of carrying on an intrastate business was applicable to appellant's business, conducted as aforesaid, Mr. Justice Butler, in delivering the opinion of the court, said:

> "But when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was while in the high pressure interstate transmission lines, and it is divided into the many thousand relatively tiny streams that enter the the small service lines connecting such mains with the pipes on the consumers' premises. So segregated the gas in such service lines and pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail." (Authorities cited.)

In the instant case the appellee treats and divides its large compressed volume of gas just as appellant did in the East Ohio Gas Company case. The only distinction between the two cases is that the East Ohio Gas Company divided, treated, and prepared its gas for sale and sold it *at retail.* In the instant case the appellee divided, treated and prepared its gas for sale and sold it *at wholesale.* It appears, therefore, that if the East Ohio Gas Company was carrying on an intrastate business in Ohio, upon which the State of Ohio could levy an occupation tax, the Interstate

Natural Gas Company, appellee herein, is likewise carrying on an intrastate business in Mississippi, upon which the State of Mississippi can levy the occupation tax imposed by Section 163 of Chapter 88, known as the Privilege Tax Law of Mississippi of 1930.

CASES RELIED ON BY APPELLEE.

The cases relied on by appellee at the hearing in the court below were, with two exceptions, cases in which a state sought to regulate the rate or price at which gas should be sold within such state. The instant case is not a regulation case. It is a case involving the constitutionality of a state occupation or privilege tax. Appellee relied on the case of *Missouri v. Kansas Gas Company*, 265 U. S. 298; *Peoples Gas Company v. Pennsylvania*, 270 U. S. 550; and *Pennsylvania Gas Company v. Public Service Commission*, 252 U. S. 23, 64 L. Ed. 434, 40 S. Ct. 279.

As to the last named case, the court in the East Ohio Gas Company case, supra, said:

> "It does not appear that there were presented, in *Pennsylvania Gas Co. v. Public Serv. Commission*, to the state court or here the considerations on which it is held that interstate commerce ends and intrastate business begins when gas flowing through pipe lines from outside the state passes into local distribution systems for delivery to consumers in the municipalities served. But, however that may be, the opinion in that case must be disapproved to the extent that it is in conflict with our decision here."

In the two cases first cited above the states of Missouri and Pennsylvania sought to regulate the price at which gas should be sold in the two states respectively. In those cases the gas was transported directly from one state to another and there sold and delivered. The court decided that the transaction was more national in character than local and hence the state could not regulate the selling price of gas as the entire transaction, consisting of transportation, sale and delivery, was interstate commerce.

In the Kansas Gas Company case, the court gave as its reason for such decision the following:

> "It is as though the commission stood at the state line and imposed its regulations upon the final step in the process at the moment the interstate commodity entered the state and before it had become a part of the general mass of the property therein."

It is evident that this reasoning is not applicable to the instant case. That case was a regulation case while the instant case deals with a statute imposing an occupation tax. The court in that case said, in this regard:

> "In the absence of congressional legislation, a state may constitutionally impose taxes, enact inspection laws, quarantine laws and general laws of internal police although they may have an incidental effect upon interstate commerce."

For the same reason the cases of *Pennsylvania v. West Virginia*, 262 U. S. 533, and *Public Utilities Commission v. Landon*, 245 U. S. 236, are not applicable here. These,

also, were regulation cases in which the regulation in question was held to discriminate against interstate commerce.

Appellee relies on two cases in which states sought to levy privilege taxes on gas being transported through interstate trunk pipe lines, namely, *Eureka Gas Company v. Hallahan*, 257 U. S. 265, and *United Fuel Gas Company v. Hallahan*, 257 U. S. 277. In both of these cases the state sought to impose a privilege tax of two cents per barrel on all oil transported through interstate trunk pipe lines. The tax was on the very article of commerce itself and hence was a direct burden on interstate commerce. The amount of the tax was directly affected by the number of barrels of oil transported through the state. The tax was held invalid as a direct burden on interstate commerce.

The method of computing the tax in the instant case is reasonable and valid and the amount of the tax is not increased or decreased by the quantity of the gas transported in interstate commerce.

V.

CONCLUSION.

In conclusion, we respectfully submit:

First, that the state privilege tax imposed by Section 163, of Chapter 88 of the Laws of Mississippi of 1930, is a constitutional and valid tax as (1) the method of computing the tax is reasonable and the amount of the tax is certain, and (2) the tax is a tax solely for the privilege of carrying on an intrastate business.

Second, the tax imposed by said section upon an in-

trastate business may be imposed upon a person, firm or corporation who is engaged, not only in intrastate business but, also, in interstate business, as the interstate business is affected indirectly and incidentally by the tax and could be engaged in without being affected at all if the intrastate business taxed were discontinued.

Third, the contracts between appellee and its respective distributors do not change the nature of appellee's business in Mississippi, as such contracts do not provide for the definite and certain order of a fixed quantity of a commodity to be shipped in response thereto, through interstate commerce.

Fourth, the appellee herein is engaged in intrastate business in the State of Mississippi as well as interstate commerce because its activities in Mississippi in dividing, treating, preparing, selling and delivering natural gas are equivalent to the breaking of an original package and the subsequent sale and delivery of its contents.

Appellant therefore specifically asks that the decree of the lower court be reversed and the perpetual injunction therein granted be dissolved.

Respectfully,

GEO. T. MITCHELL, Attorney General,

J. A. LAUDERDALE,
Assistant Attorney General.
Attorneys for Appellant.

E. R. HOLMES, Jr., Special Agent,
Of Counsel.

We hereby certify that we have this day mailed a copy of the foregoing brief to Honorable David Clay Bramlette, Attorney for Appellee, at his post office address in Woodville, Mississippi, postage prepaid.

This the ..... day of September, 1931.

By .....

Attorney for Appellants.